IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 6, 2009 Session

LYNDA GRISHAM v. STEVEN G. McLAUGHLIN, M.D. ET AL.

Appeal from the Circuit Court for Davidson County
No. 03C-2233 Barbara Hayes, Judge

No. M2008-00393-COA-R3-CV - Filed February 4, 2009

Patient sued orthopedic surgeon and his medical practice for medical malpractice. The trial court found that the patient's expert witness did not satisfy the locality rule, Tenn. Code Ann. § 29-26-115(a). The expert's testimony was, therefore, ordered stricken and summary judgment was granted. The patient appealed these two decisions. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

R. Stephen Doughty, Nashville, Tennessee, for the appellant, Lynda Grisham

Clarence James Gideon, Jr. and Alan Stuart Bean, Nashville, Tennessee, for the appellees, Steven G. McLaughlin, M.D. and Premier Orthopaedic & Sports Medicine, PLC.

OPINION

Dr. Steven McLaughlin, an orthopedic surgeon, performed total knee replacement surgery on Lynda Grisham in 2002. Ms. Grisham filed suit in 2003, alleging that Dr. McLaughlin committed medical malpractice. The trial court granted summary judgment in favor of Dr. McLaughlin and Premier Orthopaedic & Sports Medicine, PLC. Ms. Grisham filed a motion to alter or amend, which was denied by the trial court. This court subsequently reversed the trial court's grant of summary judgment and denial of the motion to alter or amend. After the remand, Ms. Grisham's expert witness died. In April 2007, Ms. Grisham disclosed a replacement expert witness, Dr. William P. Thorpe. Dr. Thorpe was deposed by Dr. McLaughlin's counsel in October 2007.

On December 4, 2007, Dr. McLaughlin filed a motion to strike Dr. Thorpe as an expert witness and a motion for summary judgment with supporting documents. The trial court granted both motions in an order entered January 22, 2008, in which the court stated:

> [t]he record before the Court demonstrates that William P. Thorpe, M.D. does not have sufficient familiarity with the medical community in and around Skyline Medical Center where Dr. McLauglin [sic] provided care and medical services to the Plaintiff so as to permit Dr. Thorpe to provide opinions which would substantially assist the finders of fact to determine the recognized standard of acceptable professional practice in the same or a similar community.

The court also issued an order partially granting summary judgment to the defendants on January 29, 2008, but that order is not challenged in this appeal. Ms. Grisham appealed the January 22, 2008 order granting the motions to strike Dr. Thorpe as an expert witness and for summary judgment.

A trial court possesses broad discretion in determining the "admissibility, qualifications, relevancy and competency of expert testimony." *McDaniel v. CSX Transp., Inc*., 955 S.W.2d 257, 263 (Tenn. 1997). We review a trial court's decision regarding expert witness competency and qualifications under an abuse of discretion standard. *Taylor ex rel. Gneiwek v. Jackson-Madison County Gen. Hosp. Dist.,* 231 S.W.3d 361, 371 (Tenn . Ct. App. 2006). "An abuse of discretion occurs when the trial court reaches a decision against logic that causes a harm to the complaining party or when the trial court applies an incorrect legal standard." *Riley v. Whybrew,* 185 S.W.3d 393, 399 (Tenn. Ct. App. 2005). The trial court's decision "'will be upheld so long as reasonable minds can disagree as to the propriety of the decision [of the trial court].'" *Id.* (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000)).

The proof requirements for a malpractice action are found in Tenn. Code Ann. § 29-26-115(a):

> In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
>
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
>
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

Subsection (a)(1) requires proof of either the standard of care in the community in which the defendant practiced at the time of the alleged injury or the standard of care in a similar community to the one in which the defendant practiced at the time of the alleged injury. As our Supreme Court has said, under Tenn. Code Ann. § 29-26-115(a)(1), "the conduct of doctors in this State is assessed in accordance with the standard of professional care in the community in which they practice or one similar to it." *Robinson v. LeCorps,,* 83 S.W.3d 718, 724 (Tenn. 2002). This is known as the locality rule.

Since Dr. Thorpe is not from Tennessee, it was incumbent upon Ms. Grisham to show that Dr. Thorpe possessed knowledge of the standard of care in a community similar to the one in which Dr. McLaughlin practiced in 2002. Dr. Thorpe's deposition did not make the required showing of similarity. Dr. Thorpe is a retired physician who practiced orthopedic medicine, including orthopedic surgery, in the Cape Girardeau, Missouri area. He admitted to having no first hand knowledge of the Nashville medical community, so his comparisons with Cape Girardeau were vague and generic. That is not, however, the end of our inquiry:

> It is not uncommon for experts whose qualifications are challenged to present additional or supplemental testimony (by affidavit, deposition, or at trial) regarding those qualifications. We know of no rule prohibiting this practice and no authority holding that such supplemental testimony cannot be based on information acquired after the initial pretrial testimony.

Pullum v. Robinette, 174 S.W.3d 124, 139 (Tenn. Ct. App. 2004). When challenged by the motion to strike Dr. Thorpe's testimony and the motion for summary judgement, Ms. Grisham produced an affidavit from Dr. Thorpe attempting to supplement his deposition testimony and establish his knowledge that the communities in which he and Dr. McLaughlin practiced were similar.

In his affidavit, Dr. Thorpe opines that "the Nashville, Tennessee medical community is similar to that of Cape Girardeau, Missouri and was so in 2002." He bases this opinion on a number of facts. He worked with the faculty at Vanderbilt University Medical School and has "some personal knowledge of the community" from visits to Nashville. Dr. Thorpe's deposition indicates that he worked with Vanderbilt University for about three years "trying to get a Navy-funded grant to look at some techniques in arthroscopy surgery. . . ." He worked in the medical engineering program and never actually saw patients there. He never had any staff privileges at any hospital in Tennessee. Dr. Thorpe does not indicate what he did during his visits to Nashville that provided him with personal knowledge of the medical community.

Other facts Dr. Thorpe considered include the following:

> Both Nashville and Cape Girardeau are areas with multiple hospitals and both communities have numerous physicians who practice in the field of orthopedics and

> orthopedic surgery. Cape Girardeau, like Nashville, has multiple specialists in all the major fields of medicine. Both communities have a number of orthopedists who engage in procedures including total knee replacements.

These statements are too vague to show sufficient similarity for purposes of the locality rule. They are so generic that they can apply to New York and Los Angeles as well as Cape Girardeau and Nashville.

Dr. Thorpe relies on his knowledge of the hospitals where he had privileges in Cape Girardeau and website information of Skyline Medical Center to support his opinion of similarity between the Nashville, Tennessee and Cape Girardeau, Missouri medical communities. He notes that the "catchment area"[1] of the hospitals in Cape Girardeau and Skyline are similar in population.

In order to satisfy the locality rule, one must show that the communities are similar. Information tending to show similarity may include "'the size of the community, the existence or non-existence of teaching hospitals in the community and the location of the community. Without such information, it is difficult to compare communities for the purpose of satisfying the locality rule.'" *Taylor*, 231 S.W.3d at 371 (quoting *Roberts v. Bicknell*, 73 S.W.3d 106, 114 (Tenn. Ct. App. 2001)). The trial court determined that Dr. Thorpe did not demonstrate sufficient familiarity with the Skyline/Nashville community to be able to show similarity between the communities he was comparing. The trial court emphasized Dr. Thorpe's deposition while Ms. Grisham emphasizes Dr. Thorpe's affidavit. We cannot say on this record that the trial court abused its discretion. Consequently, we affirm the trial court's exclusion of Dr. Thorpe as a witness.

Our Supreme Court has indicated that "a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008). This showing may be made "by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial." *Id.* Once this showing has been made, "the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist." *Id.*

With Dr. Thorpe's exclusion, Ms. Grisham had no expert witness to testify as to a breach of duty. Thus, with the exclusion of Ms. Grisham's only expert witness, Dr. McLaughlin has shown that the requirements of Tenn. Code Ann. § 29-26-115(a) could not be met. This shifted the burden of production to Ms. Grisham, who has offered nothing to show that genuine issues of material fact remain. Consequently, the defendants are entitled to judgment as a matter of law. The trial court's grant of summary judgment in favor of the defendants is affirmed.

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[1] A "catchment area" is "the geographic area served by an institution." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/catchment+area.

Costs of appeal are assessed against the appellant, Ms. Grisham, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE